



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WYMAN OSBORN and ANDREA
OSBORN,

NO. CIV. S-04-1693 LKK/KJM

Plaintiffs,

v.

O R D E R

METROPOLITAN LIFE INSURANCE
COMPANY, a New York corporation;
and FIRST AMERICAN SPECIALTY
INSURANCE COMPANY, a California
corporation,

TO BE PUBLISHED

Defendants.

Plaintiffs, Wyman Osborn and Andrea Osborn, brought suit in the Superior Court of the State of California against two insurance companies, Metropolitan Life Insurance Company ("Met Life") and First American Special Insurance Company ("First American"). Wyman Osborn asserts against Met Life a breach of duty of good

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1 faith and fair dealing claim and a breach of contract claim.¹

2 Against First American the Osborns assert identical claims.²

3 Defendant Met Life answered and asserted twenty four
4 affirmative defenses, among them, improper joinder of both
5 plaintiffs and defendants. Defendant Met Life then removed the
6 action,³ arguing that plaintiffs fraudulently joined First American
7 and Met Life. The matter is before the court on plaintiffs' motion
8 to remand.

9 **I.**

10 **FACTS⁴**

11 Plaintiff Wyman Osborn alleges that he paid premiums and
12 performed all acts necessary to ensure coverage under the
13 disability policy issued to him by Met Life. Pl.'s Compl. at ¶ 5.

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15 ¹ Wyman Osborn had a disability insurance policy with Met
16 Life.

17 ² Wyman and Andrea Osborn have homeowner's insurance issued
18 by First American.

19 ³ Defendants initially removed the matter to the wrong
division of the Eastern District (Fresno). The case was
transferred from Fresno to this court.

20 ⁴ The facts are drawn from plaintiffs' complaint and all
21 papers related to the motion to remand. The Ninth Circuit has
explained that generally in deciding remand motions it is generally
proper to "look only to a plaintiff's pleadings to determine
removability." Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318
(9th Cir. 1998) (citation omitted). The court, however, has also
held that "[w]here fraudulent joinder is an issue, we will go
somewhat further. The Defendant seeking removal to the federal
court is entitled to present facts showing the joinder to be
fraudulent." Id. (citations omitted). In the instant case,
defendants argue that the misjoinder of defendants is so egregious
as to constitute fraudulent joinder. Def.'s Opp'n at 5-6.
Accordingly, the court may go outside the pleadings to determine
whether joinder is fraudulent and whether remand is appropriate.

1 On January 31, 2003, Mr. Osborn notified Met Life that in September
2 2002, he had an accident. He claimed that he ran into a tree limb
3 and that his primary diagnosis was cervical lumbar problems.
4 Kaarela Decl. at ¶ 2; Def.'s Exh. 1. A claim form was sent to Mr.
5 Osborn and received back by Met Life on February 18, 2003. In the
6 returned form, Mr. Osborn claimed that he was injured when "on or
7 about 9-25-02, I was chassing(sic) my dog in backyard when I ran
8 under a tree I did not duck & knocked myself out running into a
9 limb." Mr. Osborn further claimed that he experienced a "pinch in
10 neck" when he reached or pulled to pick something up and that his
11 right arm would go numb. Kaarela Decl. at ¶ 3. Finally, he
12 maintained that he could not continue working as a concrete
13 contractor. Id.

14 On March 21, 2003, Met Life sent Mr. Osborn a letter denying
15 benefits. Def.'s Exh. 3.⁵ On May 19, 2003, plaintiffs' counsel
16 sent a letter to Met Life noting plaintiff's disagreement with Met
17 Life's determination. Def.'s Exh. 4.

18 On March 13, 2002, the Osborns purchased a home located in
19 Stockton, and in May, escrow closed on the residence. Plaintiffs
20 aver that shortly after they moved into the home, they began to
21 suffer a variety of serious symptoms,⁶ id. at ¶ 8, which at that

22 ⁵ Met Life explained, inter alia, that the orthopedic surgeon
23 they hired as a consultant on this matter advised the company that
24 the normal recovery period for this type of injury was eight weeks.
Id. at ¶ 4.

25 ⁶ The symptoms allegedly included fatigue, nasal congestion,
26 recurrent sinus pain and infections, joint swelling, loss of sense
of smell, disabling shortness of breath, sensitivity to chemical
odors,

1 time were undiagnosed.

2 In July 2003, plaintiffs were seen by Dr. Vincent Marinkovich,
3 an allergist, who ordered blood tests for both plaintiffs and
4 concluded that their symptoms were the result of exposure to mold.
5 Dr. Marinkovich suggested that plaintiffs move out of the residence
6 and leave all of their belongings behind, which they did on or
7 about August 9, 2003. Pl.'s Compl. at ¶ 10; Pl.'s Exh. B.

8 The plaintiffs allege that they paid premiums and performed
9 all acts necessary to ensure coverage under their homeowner's
10 insurance issued by First American. Id. at ¶ 6. Before moving out
11 of their residence, plaintiffs submitted an insurance claim to
12 First American. First American first confirmed that the Osborns'
13 claim was covered, but then subsequently denied coverage. On
14 August 25, 2003, plaintiffs complained to First American that its
15 sudden change of position was unjustified because the company
16 performed no analysis or testing to reach its conclusion. Pl.'s
17 Compl. at ¶ 12.

18 On or about August 13, 2003, plaintiffs' counsel sent Met Life
19 another letter enclosing a copy of a report by Dr. Marinkovich
20 stating that Mr. Osborn had seen the doctor on July 23, 2003. Met
21 Life obtained treatment records from Dr. Marinkovich which
22 demonstrated that the first time Mr. Osborn had seen Dr.
23 Marinkovich was on July 23, 2003. Kaarela Decl. at ¶ 6. Met Life
24 continued to deny benefits.

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26 whole body pain, joint problems and leg cramps.

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II.

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STANDARDS

3 28 U.S.C. § 1447(c) provides that a case removed from state
4 court should be remanded if it appears that it was removed
5 improvidently. The burden is on the party seeking to preserve
6 removal to establish the existence of federal subject matter
7 jurisdiction. Wilson v. Republic Iron & Steel Co., 257 U.S. 92,
8 97 (1921); Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).
9 "Because the 'removal statutes are strictly construed against
10 removal,' Libhardt v. Santa Monica Dairy Co., 592 F.2d 1062, 1064
11 (9th Cir. 1979), generally speaking, doubts about removal must be
12 resolved in favor of remand." Dodd v. John Hancock Mut. Life Ins.
13 Co., 688 F.Supp. 564, 566 (E.D. Cal. 1988).

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III.

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ANALYSIS

16 Met Life argues that they are entitled to remove the suit
17 because plaintiffs' claim against it was not properly joined with
18 the claims against First American. Met Life argues that the court
19 should ignore First American's citizenship⁷ because of the asserted
20 misjoiner. That is, Met Life contends that the complaint really
21 pleads two separate actions - one against First American that is
22 not removable, and one against it that is removable. Accordingly,
23 they maintain, plaintiffs' motion to remand should be denied.

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26 ⁷ First American is a California corporation.

1 Plaintiffs respond that they properly joined Met Life and First
2 American under the California rule of permissive joinder.

3 Met Life relies on Tapscott v. MS Dealer Service Corp., 77
4 F.3d 1351 (11th Cir. 1996), abrogated on other grounds, Cohen v.
5 Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000), which held that
6 misjoinder of claims may be as fraudulent as joining defendant
7 parties who have no real connection with the controversy. I am,
8 of course, not bound by the Eleventh Circuit and, as discussed
9 below, entertain substantial doubts as to propriety of the Tapscott
10 doctrine. Moreover, assuming arguendo that a "fraudulent
11 misjoinder" doctrine is viable, defendant has not met its burden
12 of showing that plaintiffs fraudulently joined the two defendants.

13 **A. "FRAUDULENT MISJOINDER"**

14 Diversity jurisdiction under 28 U.S.C. § 1332 requires
15 complete diversity, i.e. every plaintiff must be diverse from every
16 defendant. An action may nonetheless be removable if joinder of
17 the non-diverse parties is fraudulent. Stated differently,
18 fraudulently joined defendants will not defeat removal on diversity
19 grounds. McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir.
20 1987).

21 The Ninth Circuit has explained that "fraudulent joinder is
22 a term of art. If the plaintiff fails to state a cause of action
23 against a resident defendant, and the failure is obvious according
24 to the settled rules of the state, the joinder of the resident
25 defendant is fraudulent." Ritchey, 9 F.3d at 1318 (quoting McCabe,
26 811 F.2d at 1987). Here, however, defendants ask this court to

1 adopt a new doctrine, procedural misjoinder. Below, I explain why
2 I doubt the appropriateness of the doctrine, and why, in any event,
3 given the pleading, remand is proper.

4 The Ninth Circuit has not found occasion to address, much less
5 adopt the Tapscott holding, and thus, I must engage in an
6 independent evaluation of its propriety. In Tapscott, a putative
7 class action was removed. Numerous classes of defendants were
8 joined under Federal Rule 20.⁸ The Eleventh Circuit held that the
9 factual commonality among the plaintiffs' claims against the
10 different classes of defendants was not sufficient to satisfy
11 Federal Rule of Civil Procedure 20. The court then held that
12 egregious misjoinder of parties, as measured by Rule 20 standards,
13 amounted to fraudulent joinder, permitting the court to disregard
14 the citizenship of the non-diverse defendants in a removed action.

15 Citing Tapscott, the Fifth Circuit adopted the misjoinder of
16 parties theory. See In re: Benjamin Moore & Co., 309 F.3d 296, 298
17 (5th Cir. 2002); and see In re: Benjamin Moore & Co., 318 F.3d 626,
18 630-31 (5th Cir. 2002).⁹ Since the Tapscott and Benjamin Moore
19 decisions, district courts in the Fifth, and Eleventh Circuits,
20 being bound, have followed the fraudulent misjoinder doctrine, as

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22 ⁸ Rule 20 of the Federal Rules of Civil Procedure is identical
23 to Rule 20 of the Alabama Rules of Civil Procedure. See Tapscott,
24 77 F.3d at 1355, n.1.

25 ⁹ Although the misjoinder in Tapscott involved the egregious
26 misjoinder of defendants, other courts have applied this theory to
the misjoinder of plaintiffs. See, e.g., Koch v. PLM Int'l, No.
Civ. A. 97-0177-BH-C, 1997 WL 907917, at *2 (S.D. Ala. September
27, 1997); Lyons v. The Am. Tobacco Co., Inc., No Civ. A. 96-0881-
BH-S, 1997 WL 809677 at *4 (S.D. Ala. Sept. 30, 1997).

1 has a district court in the Seventh Circuit.

2 Professors Wright, Miller, and Cooper have characterized the
3 Tapscott "fraudulent misjoinder" theory as a "new concept" that
4 "appears to be part of the doctrine of fraudulent joinder." WRIGHT,
5 MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction 3d § 3723 at
6 656. They observe that the doctrine adds to the complexity of a
7 federal court's decision as to removal, and note that even in the
8 Eleventh Circuit not all procedural misjoinder rises to the level
9 of fraudulent joinder. They posit that "numerous additional
10 decisions will be needed to clarify" the distinction between which
11 misjoinder claims rise to the level of "egregiousness" justifying
12 a refusal to remand. Id. They further suggest that an aggrieved
13 defendant could avoid the confusion and complexity created by this
14 standard by seeking relief from the misjoinder in state court and
15 then removing to federal court. Id.

16 My own judgment is that the last thing the federal courts
17 need is more procedural complexity. I thus conclude that the
18 better rule would require Met Life to resolve the claimed
19 misjoinder in state court, and then, if that court severed the case
20 and diversity then existed, it could seek removal of the cause to
21 federal court.¹⁰

22
23 ¹⁰ As Wright, Miller, and Cooper note, the time limit for
24 removal would not affect a defendant's ability to have the
25 misjoinder issue resolved in state court first. "Removal is not
possible until the misjoined party that destroys removal
jurisdiction is dropped from the action, the thirty-day time limit
for removal (but not the overall one-year limit for diversity
cases) would not begin to run until that had occurred and thus a
requirement that misjoinder be addressed in the state court would

1 Moreover, application of Tapscott raises other unnecessary
2 difficulties. Since the decision, those following it have
3 questioned how to apply the doctrine and whether, when considering
4 the joinder of parties, a court should rely on Rule 20 of the
5 Federal Rules of Civil Procedure or its state law counterpart. In
6 some cases, where the federal rule of procedure on joinder tracks
7 the corresponding state rule, the question would not have a
8 practical import. In states such as California, however, the
9 state's rule permitting joinder is broader than the federal rule.¹¹

10 In sum, because there appears to be no reason to develop a
11 fraudulent misjoinder theory, and because of the uncertainty as to
12 how such a theory should be applied, I respectfully decline to
13 apply it. This conclusion is supported by the well-recognized
14 doctrine that a removing party bears a heavy burden of persuasion
15 and that if there is any doubt as to whether removal was proper,
16 remand is required. Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th
17 Cir. 1996). For all the above reasons I conclude that plaintiffs'
18 motion to remand should be granted.

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22 not impair the ability of an individual to remove an action
23 following the elimination of the improperly joined party." WRIGHT,
24 MILLER, AND COOPER, Jurisdiction 3d § 3723 at 656.

25 ¹¹ In Mississippi, which also has a more liberal joinder
26 rule, the federal courts have been divided on the question.
Compare Polk v. Lifescan, Inc., 2003 WL 22938056 (N.D. Miss.
September 23, 2003) (applying Mississippi Rule 20); Coleman v.
Conseco, 238 F.Supp.2d 804 (S.D. Miss. 2002) (applying Federal Rule
20).

1 | B. UNDERLYING JOINDER QUESTION

2 Because the question of fraudulent misjoinder is a question
3 of first impression in this circuit, it is appropriate to note that
4 even if I were to accept the doctrine, remand would be required.
5 Below, I explain why.

6 To resolve the question of fraudulent misjoinder, I must first
7 determine which joinder rule, state or federal, governs.

8 Notwithstanding Tapscott's application of Federal Rule 20, most
9 courts looking at this issue have applied the state rule. This
10 seems the better choice since the question is whether the parties
11 were misjoined in state court. See, e.g., Jackson v. Truly, 307
12 F.Supp.2d 818, 824 (N.D. Miss. 2004). Indeed, application of the
13 federal rules seems particularly inappropriate in these days of
14 heightened sensitivity to federalism concerns. I thus conclude
15 that, if the fraudulent misjoinder doctrine were to be adopted, the
16 applicable joinder standard should be derived from state law.

17 Met Life argues that there is no difference between California
18 Code of Procedure § 379 and the federal rule, because the state
19 rule "virtually mirrors Rule 20." I cannot agree. California
20 joinder rules have been construed liberally¹² and there are

22 ¹² In 1927, the Legislature enacted Code of Civil Procedure
23 379 with the goal of liberalizing procedures for permissive
 joinder of defendants. Landau v. Salam, 4 Cal.3d 901, 904 (1971).
 The section reads:

24 (a) All persons may be joined in one action as defendants if there
25 is asserted against them:

26 (1) Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same

1 situations where the State's joinder rules would allow for
2 permissive joinder of defendants while the federal rules would not.
3 As pertinent here, in federal practice, all claims joined must
4 arise out of the same transaction or series of transactions, but
5 under California law, a common question of liability satisfies the
6 party-joinder rules. See Judge Robert E. Jones, et al., Cal. Prac.
7 Guide Civ. Pro. Before Trial Ch. 2-C, 2:222-23.

8 Here, plaintiffs have alleged a claim against defendants which
9 they assert arises out of the same transaction or occurrence, i.e.,
10 the mold which plaintiffs claim caused their illness and required
11 them to abandon their home. It appears irrelevant that Mr. Osborn
12 originally based his disability claim on a collision with a tree
13 limb. It is what plaintiffs assert, not what defendants ultimately
14 prove, that a California court looking at misjoinder must
15 consider. See Cal. Civ. Proc. Code & 379(a) ("All persons may be
16 joined in one action as defendants if there is asserted against
17

18 transaction, occurrence, or series of transactions or
19 occurrences and if any question of law or fact common to all
these persons will arise in the action; or

20 (2) A claim, right, or interest adverse to them in the
property or controversy which is the subject of the action.

21 (b) It is not necessary that each defendant be interested as to
every cause of action or as to all relief prayed for. Judgment may
be given against one or more defendants according to their
22 respective liabilities.

23 (c) Where the plaintiff is in doubt as to the person from whom he
or she is entitled to redress, he or she may join two or more
24 defendants, with the intent that the question as to which, if any,
of the defendants is liable, and to what extent, may be determined
25 by the parties.

1 them . . ."). Plaintiffs are the masters of their complaint and
2 their allegation that denial of coverage under both insurance
3 policies and the mold contamination caused their injuries is
4 sufficient. Put somewhat differently, as envisioned under Civ.
5 Proc. Code § 379(a), plaintiffs contend that they have a right to
6 relief against both Met Life and First American "jointly,
7 severally, or in the alternative" which arises out of the mold
8 contamination, and thus questions of fact common to both defendants
9 will arise in the action.

10 In the alternative, plaintiffs argue that under Civ. Proc.
11 Code § 379(c) they should be able to join the defendants in the
12 same action because they are uncertain as to the extent each is
13 liable for their injuries, including their emotional distress.
14 Pl.'s Repl. at 5-6. Plaintiffs' argument is persuasive. In such
15 cases, it appears to be California's law that the injuries
16 sustained by plaintiff need not arise from the same transaction to
17 justify joinder because the single or cumulative injury is
18 sufficient to fulfill the requisite factual nexus. See Landau, 4
19 Cal.3d at 907.¹³

20 | ////

21 | // /

22 || //

¹³ This analysis demonstrates another reason to reject the theory of fraudulent misjoinder. While federal courts, by virtue of their diversity jurisdiction, are quite comfortable resolving state substantive law issues, we have no occasion to address state procedures. Adoption of the doctrine, however, will require mastery of an otherwise irrelevant body of law.

1 In sum, I conclude that this court does not have
2 jurisdiction over this case even given defendants' theory of
3 fraudulent misjoinder of claims.¹⁴

IV.

ORDER

6 For the foregoing reasons, the above-captioned case is hereby
7 REMANDED to the Superior Court of the State of California in and
8 for the County of San Joaquin.

9 IT IS SO ORDERED.

10 DATED: October 20, 2004.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

25 ¹⁴ Given my conclusions above, I need not consider the
26 effect of Met Life's having removed to the wrong division of
this court.

United States District Court
for the
Eastern District of California
October 22, 2004

* * CERTIFICATE OF SERVICE * *

2:04-cv-01693

Osborn

v.

Metropolitan Life In

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 22, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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(Case # CV 023285)

* VAC SC 10/25/04 *

Jack L. Wagner, Clerk

BY:


Deputy Clerk

United States District Court
for the
Eastern District of California
November 2, 2004

* * CERTIFICATE OF RESERVICE * *

2:04-cv-01693

Osborn

v.

Metropolitan Life In

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 2, 2004, I RE-SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Deputy Clerk